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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREEME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. 87-134

SAMSON E. SHONDE,

Petitioner,

v.

STATE OF MINNEESOTA,

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 46 of this court, petitioner, Samson E. Shonde, asks leave to file the attached petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was presented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court on appeal to the Eighth Circuit Court of Appeals.

Dated: September 23, 1987

Respectfully submitted,

Daniel M. Scott by C.M.M. Cecilia M. Michel

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Attorneys for Respondent

Supreme Court, U.S.
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NO. 87-134

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

SAMSON E. SHONDE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Samson E. Shonde files the instant response in opposition to the Petition for Writ of Certiorari, filed July of 1987.

QUESTION PRESENTED

Was the district court acting within its authority in vacating the respondent's conviction after the government initiated deportation proceedings when the facts show that the district court had entered an order stating that it would reconsider its judgment if deportation proceedings were initiated against the respondent.

STATEMENT OF FACTS

Samson E. Shonde, respondent, is a forty-two-year-old man born on February 18, 1943, in Nigeria. In 1974, Mr. Shonde came to the United States. Presently he is married and has two children. He and his family resided in St. Paul, Minnesota where Mr. Shonde owned and operated Sam's Superette. Mr. Shonde has no prior felony convictions and has never been on parole or probation.

On August 22, 1984, Samson Shonde and Akinsanya A. Cole were indicted in a three count indictment for unlawful dealing in food stamps in violation of Title 7, United States Code, Section 2224(b) and Title 18, United States Code, Section 2.

Samson Shonde pled guilty to count II of the indictment before Federal District Court Judge Miles Lord on October 16, 1984.[1] On the same day, the trial of Mr. Cole began. Judge Lord dismissed the case against Mr. Cole on October 17.

On December 6, 1984, at the sentencing hearing, Mr. Shonde was ordered to pay restitution and was placed on probation for two years. The court also ordered that the defendant not be deported pursuant to the court's authority as provided for in Title 8, United States Code, Section 1251(b). The court also ordered that if any future deportation hearings arose, he would entertain a motion from the defendant to va-

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[1] The Honorable Miles W. Lord retired on September 11, 1985.

cate his plea of guilty and dismiss the indictment (See Judgment and Commitment Order, Appendix 1, attached). Indeed, the prosecutor at the sentencing hearing specifically asked the court to include language on the judgment and commitment order regarding the "immigration matter:"

> MR. HERMANN [Prosecutor]: I wonder if it would be appropriate for the court to state on the judgment and commitment regarding the immigration matter, that 'not to deport'?
>
> THE COURT: Well, you folks get together on that, will you please?
>
> MR. HERMANN: Sure.
>
> THE COURT: Okay.
>
> MR. HERMANN: All right.
>
> MR. PETERSON: Yes. Thank you very much.
>
> THE DEFENDANT: Thank you.
>
> MR. HERMANN: Your Honor, we would move for dismissal of the remaining counts of the indictment.
>
> THE COURT: So ordered. Thank you, Mr. Hermann.

(Appendix G, p.18a).

Counsel for the government signed the Judgment and Commitment Order as approved, was present at the time of sentencing, and was aware of the court's intention in this regard. No objection to the court's order was voiced by the government at this time. Count I and II of the indictment were dismissed at the time of sentencing.

On February 26, 1985, Mr. Shonde was ordered to appear before the United States Immigration Service to show cause why

he should not be deported. The hearing was continued to April 1985, pending the outcome of his I-130 Petition, a petition filed on his behalf by an immediate family member.

On April 23, 1985, the immigration judge dismissed the deportation hearing and remanded the case to the district director for disposition of Mr. Shonde's adjustment of status application which could have ultimately led to his deportation. (Appendix H, p.21a-22a).[2] The conviction would come into play in the deportation context because Mr. Shonde was found deportable at the original hearing and made a request for discretionary relief of adjustment status based upon his marriage to a United States citizen as well as voluntary departure in lieu of deportation. The two discretionary reliefs have an element of good moral character. To be eligible for voluntary departure, a person must be a good moral character for five years immediately preceding. (See Addendum H, p.22a-23a). Therefore, a criminal conviction would have affected Mr. Shonde's status in this country and possibly any deportation which could have resulted from status adjustment. Before being vacated, the conviction might have been an adverse factor in exercising the discretion with regard to relief from deportation, specifically, in connection with Mr. Shonde's adjustment of status application.

At the time of the government's appeal in 1985, Mr. Shonde's adjustment of status application was being reviewed

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2Hereinafter, Appendix with reference to letters of the alphabet refer to the Appendix filed with the government's Petition for Writ of Certiorari.

by the district director. The fact that application adjustment of Mr. Shonde's status was still pending at the time of the appeal, makes it clear that immigration officials may have been awaiting the outcome of the appeal proceedings, contrary to appellant's assertion that a criminal conviction would not affect the application.

On May 21, 1985, a motion was submitted by Mr. Shonde to vacate the guilty plea and dismiss the charge. On June 7, 1985, notice was given that the motion submitted did not comply with the procedure outlined in Title 28, United States Code, Section 2255. On June 25, 1985, a petition was submitted on behalf of Mr. Shonde pursuant to Title 28, United States Code, Section 2255, requesting that the guilty plea be vacated and the indictment dismissed.

On July 2, 1985, Mr. Shonde appeared for a hearing on a petition before the district court. Based upon all the files, records, and proceedings in this matter, the court vacated Mr. Shonde's plea and dismissed the indictment. On July 24, 1985, the court issued an order vacating Mr. Shonde's guilty plea and dismissed the indictment against him.

The government filed a notice of appeal from the order pursuant to Title 18, United States Code, Section 3731 on August 1, 1985. On appeal, the appellant sought reversal of the order by Judge Lord vacating the guilty plea and dismissing the indictment.

On October 16, 1986, a panel of this court including Chief Judge Lay, Circuit Judge McMillian, and Senior U.S. Dis-

trict Judge Hanson issued its opinion affirming the order of the District Court. United States v. Shonde, 803 F.2d 937 (8th Cir. 1986). (Appendix A, p.1a).

Petitioner submitted a petition for rehearing en banc. Mr. Shonde opposed the petition. The United States Eighth Circuit Court of Appeals considered the petition and denied it. Petition for rehearing by the panel was also denied. (Appendix D, p.7a).

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari in this matter is nothing more than a bold attempt by the Justice Department to assert the power of the executive branch over the power of the judicial branch. It is respondent's position that this is not one of the important or special cases which is appropriate for review by the United States Supreme Court.

Rule 17 of the Rules of the Supreme Court clearly states that:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefore.

"Special and important reasons to relate problems beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1957). The unique factual circumstances of this case and the issues arising therefrom were properly resolved by the District Court and affirmed by the Eighth Circuit Court of Appeals.

The government in this case, while it is free to re-indict the respondent, has chosen to deplete the resources of the judiciary in the Eighth Circuit Court of Appeals and now in the United States Supreme Court by bringing this matter for review again. As the case now stands, the United States Attorneys' Office is free to seek indictment of the respondent on the same facts alleged in the indictment which was dis-

missed. Indeed, the government could have immediately sought reindictment of Mr. Shonde once the district court's order was filed. Instead, the actions of the government have caused extensive expenditures of the resources of the judiciary in continuing to question the district court's order. The government is not prejudiced by the district court's order and has another alternative to resort to other than a Petition for Writ of Certiorari. This is a fact which the petitioner has failed to divulge to this court. The government's action in this case reflects a disregard for judicial authority as well as its own prosecutor's actions in approving the judge's order.

At the sentencing hearing the government tacitly approved the language below at the sentencing hearing and proposed it be inserted in the judgment and commitment order of which the government now complains. The prosecutor approved the language by his signature below it, which preceded the court's signature:

> It is further ordered that the defendant is not to be deported under this court's authority in Title 8, United States Code, Section 1251(b). If any deportation proceedings arise in the future, this court will entertain a motion from the defendant to vacate his plea of guilty and dismiss the charge.

(Judgment and Commitment Order, Appendix 1, attached).

The government may not now legitimately complain of an action which the court took when the order was breached by the initiation of deportation hearings:

> Because the government breached the order by bringing deportation proceed-

> ings, it was appropriate for the district court to entertain Shonde's motion to vacate his plea of guilty and dismiss the indictment.

United States v. Shonde, 803 F.2d 937 (8th Cir. 1986), also Appendix A, p.3a.

Initially, the government presents a discussion of statutory authority as the basis for the first reason for granting the writ. However, this ignores the prosecutor's initial actions and acquiescence to the judge's order at sentencing. Petitioner's point that the deportation proceeding at issue was not commenced under a particular statute is not illuminative. The court's order specifically stated "any deportation proceedings." (emphasis added). See Appendix 1, attached. There was a violation of the judge's order, contrary to petitioner's assertion. The court had inherent authority to enter its order as affirmed by the appellate court in United States v. Shonde, 803 F.2d 937, 938 (8th Cir. 1986).

The government relies heavily on the case of United States v. Addonizio, 442 U.S. 178 (1979), a case dealing with issues of the court's jurisdiction versus that of the United States Parole Commission. It should be noted that this case is distinguishable for many reasons, most notably, because the respondent was not on parole, but rather on probation. A probationer remains within the district court's jurisdiction, while a parolee does not. Therefore, contrary to what petitioner states, the principles in Addonizo do not apply here. Therefore, petitioner's leap that the court's order

violated the Addonizo principles does not provide a sufficient reason to warrant this court's review.

The government's second reason for granting the writ is insufficient also. Contrary to petitioner's assertion that there was no claim that respondent's plea was not voluntarily and intelligently entered in this case, the respondent did raise this issue in its brief to the United States Eighth Circuit Court of Appeals. See Appendix 2 (attached, incorporating Mr. Shonde's response as appellee in the court below). Respondent's plea did not fully comply with Rule 11 of the Federal Rules of Criminal Procedure. (Appendix E, p.8a-11a).

The petitioner's editoral footnote number four of the petition improperly asserts a collateral issue by stating that, "The court's comments at the time of the codefendant's trial [indicated] that the court did think the facts were sufficient to sustain a conviction of respondent." (Petition, p.15). The issue is whether the district court properly vacated the guilty plea. The court of appeals correctly held that because the government breached the order, the district court's order was appropriately made.

Finally, the Petitioner complains of the court's action in dismissing the indictment, stating that prosecution decisions are committed to the executive branch. Nevertheless, as stated, the petitioner has failed to exercise its own prosecutorial power to re-indict respondent. There has never been an impediment by the court's order to the government's power to do so. It appears the government has decided not to re-

indict Mr. Shonde and instead has chosen to attempt to assert the power of the executive branch over the judicial branch.

There is no "unprecedented shift of authority" as the petitioner characterizes this matter. Rather there is a concerted effort on the part of the government to overrun the power of the judiciary. This is most evident in the prosecutor's refusal to exercise the option of re-indictment. The court's action was tailored to this specific case under particular circumstances of which the government was well aware.

CONCLUSION

Based on the record, the decision of the Eighth Circuit Court of Appeals, and the arguments herein, respondent, Samson E. Shonde, requests that the instant Petition for Writ of Certiorari be summarily denied.

Dated: September 23, 1987

Daniel M. Scott by cmm

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Attorneys for Respondent

APPENDIX

United States of America vs.

United States District Court for

DEFENDANT: SAMSON F. SHONDE

DISTRICT OF MINNESOTA - FOURTH DIVISION

DOCKET NO.: CRIMINAL 4-84-74(01)

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: December DAY: 6 YEAR: 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Mark W. Peterson
(Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, Count II [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of illegal dealing in food stamps as set forth in Count II, in violation of Title 7, United States Code, Section 2024(b) and Title 18, United States Code, Section 2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that ~~[illegible]~~ The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of two (2) years, upon the following terms and conditions:

1. That he comply with all local, state and federal law;

2. That he comply with the rules and regulations of the probation department.

SPECIAL CONDITIONS OF PROBATION

It is ordered that the defendant pay $746.00 in restitution to the Dept. of Agricult

It is further ordered that the defendant is not to be deported under this Court's authority provided in Title 8, United States Code, Section 1251(b). If any deportation proceedings arise in the future, this Court will entertain a motion from the defendant to vacate his plea of guilty and dismiss the charge.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

APPROVED:

Francis X. Hermann, Assistant U.S. Attorney

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Miles W. Lord

Miles W. Lord Date Dec. 7th 1984

APPENDIX 1

In The

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 85-5282-MN

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

SAMSON E. SHONDE,

Appellant.

Appeal from the United States District Court for the

District of Minnesota, Fourth Division

BRIEF OF APPELLANT

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Attorney for Appellant

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellee requests oral argument not to exceed ten minutes. Mr. Shonde respectfully disagrees with appellant's contention that there is no need for oral argument and maintains that the law and the facts support the decision of the district court.

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STATEMENT OF THE ISSUE

WHETHER THE COURT PROPERLY ENTERED THE ORDER AND JUDGMENT VACATING APPELLEE'S GUILTY PLEA AND DISMISSING THE INDICTMENT.

United States v. Buckhanon, 505 F.2d 1079 (1974)

McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969)

Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976)

Marteney v. United States, 216 F.2d 760 (10th Cir. 1954)

STATEMENT OF THE FACTS AND CASE

Samson Shonde is a 42 year old man born on February 18, 1943 in Nigeria. While living in Nigeria, Mr. Shonde served in the military as a communication efficiency officer and trained solders from 1966 to 1974. In 1974 Mr. Shonde came to the United States. Presently he is married and has two children. He and his family reside in St. Paul, Minnesota, where Mr. Shonde owns and operates Sam's Superette. Mr. Shonde has no prior felony convictions and has never been on probation or parole.

On August 22, 1984, Samson E. Shonde and Akinsanya A. Cole were indicted in a three count indictment for unlawful dealing in food stamps in violation of Title 7, United States Code, Section 2024(b) and Title 18, United States Code, Section 2.

Samson Shonde pled guilty to Count II of the indictment before Federal District Judge Miles Lord on October 16, 1984. On that same day the trial of Mr. Cole began. Judge Lord dismissed the case on October 17 because the facts didn't sustain a conviction. (Addendum I, page 7).

On December 6, 1984, at the sentencing hearing, Mr. Shonde was ordered to pay restitution and received two years probation. Judge Lord also ordered that the defendant not be deported, pursuant to the court's authority as provided for in Title 8, United States Code, Section 1251(b). The Court also

ordered that if any future deportation hearings arose, he would entertain a motion from the defendant to vacate his plea of guilty and dismiss the indictment, see judgment and commitment order, Addendum D. Counsel for the government was present at that time and aware of the Court's intention. Count I of the indictment was dismissed at the time of sentencing. (Addendum C).

On February 26, 1985, Mr. Shonde was ordered to appear before the United States Immigration Service to show cause why he should not be deported. The hearing was continued to April, pending the outcome of his I-130 petition (a petition filed on his behalf by an immediate family member).

On April 23, 1985, the immigration judge dismissed the deportation hearing, and remanded the case to the district director for disposition of Mr. Shonde's adjustment of status application which could ultimately lead to his deportation. (Addendum I, page 5). The conviction would come into play in the deportation context because Mr. Shonde was found deportable at the original hearing and made a request for discretionary relief of adjustment status based on his marriage to a United States citizen, as well as voluntary departure in lieu of deportation. The two discretionary reliefs have an element of good moral character where the conviction would come into play. To be eligible for voluntary departure, a person must be of good moral character for the five years immediately preceding. (See Addendum I, 6-7). Therefore a criminal con-

viction would affect Mr. Shonde's status in this country and possibly any deportation which results from status adjustment. Before its being vacated by Judge Lord, the conviction might have been an adverse factor in exercising discretion with regard to relief from deportation, specifically, in connection with Mr. Shonde's adjustment of status application. Mr. Shonde's adjustment of status application is currently being reviewed by the district director. The fact that application adjustment of Mr. Shonde's status is still pending makes it clear that immigration officials may be awaiting the outcome of these proceedings, contrary to appellant's assertion that a criminal conviction will not affect the application.

On May 21, 1985, a motion was submitted by Mr. Shonde to vacate the guilty plea and dismiss the charge, as per judicial recommendation. On June 7, 1985, notice was given that the motion submitted did not comply with judicial procedure as outlined in Title 28, United States Code, Section 2255. On June 25, 1985, a petition was submitted on behalf of Mr. Shonde pursuant to Title 28, United States Code, Section 2255, requesting that the guilty plea be vacated and the indictment be dismissed.

On July 2, 1985, Mr. Shonde appeared for a hearing on the petition before Judge Miles Lord. Based upon all the files, records and proceedings in this matter Judge Lord vacated Mr. Shonde's plea and dismissed the indictment. On July 24, 1985,

Judge Lord issued an order vacating Mr. Shonde's guilty plea and dismissing the indictment against him.

The government filed a notice of appeal from Judge Lord's order pursuant to Title 18, United States Code, Section 3731 on August 1, 1985. On appeal, appellant seeks reversal of the order and judgment vacating the guilty plea and dismissing the indictment.

Mr. Shonde opposes reversal of the order and judgment on the ground that the same were properly decided.

ARGUMENTS

I.

THE DISTRICT COURT PROPERLY VACATED APPELLEE'S GUILTY PLEA AND PROPERLY DISMISSED THE INDICTMENT.

Contrary to the appellant's statement that Judge Lord issued an order "stating no reasons", the order issued on July 24 was the culmination of over a year's worth of proceedings in this matter. Mr. Shonde was indicted in August of 1984. It was not until over nearly a year later in July of 1985 that Judge Lord made his decision to vacate the guilty plea and dismiss the indictment. The decision was based upon all of the files, records and proceedings in this matter. (See Addendum J). The order is not unlike other judicial orders in which the district court judge records in writing his decision on the merits of the proceeding before him. Indeed, Judge Lord made a considered judgment in this case after listening to the arguments of counsel as well as the facts presented in the trial of the co-defendant Cole. Judge Lord had the opportunity to view the evidence which the government presented at trial, listen to the government witnesses, and access the credibility of testimony. Thus Judge Lord had more than the cold record upon which to base his decision. He had a working knowledge of the entire record. The district court's findings in a habeas corpus proceeding must prevail unless found to be clearly erroneous. Mobley ex. rel. Ross v. Meek, 531 F.2d 924, 927 (8th Cir. 1976), rev'd on other grounds

429 U.S. 28, 97 S.Ct. 202; Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981). The rule in both civil and criminal cases is that even if the basis of trial court's decision is erroneous, such decision will be affirmed if the record reveals another ground which supports the decision. Scivally v. Time Insurance Company, 724 F.2d 101, 103 (10th Cir. 1983); California Bankers Association v. Shultz, 94 S.Ct. 1494, 1522, 416 U.S. 21, 71 (1974); United States v. Buckhanon, 505 F.2d 1079, 1083 (1974) (evidence admitted for erroneous reason still admissable under another reason).

Judge Lord had the benefit of listening to Agent Milam who testified at the Cole trial. The words attributed to Mr. Shonde on page 5 of the appellant's brief are presented by appellant as direct quotations from Mr. Shonde. However, there is no support in the record identified by the government for such attribution. Indeed the testimony attributed to Mr. Shonde came from Agent Milam's testimony and not directly from Mr. Shonde. Indeed Mr. Shonde was not present at the Cole trial and did not have an opportunity to cross-exam the witnesses or speak for himself at the Cole trial. Even so, Judge Lord, an experienced trial judge adduced that the evidence was insufficient to support a conviction in that case. (See Addendum I, page 7).

The government concedes after a lengthy discussion of the testimony adduced at Cole's trial that the evidence presented at Cole's trial may have been insufficient. Stating that the sufficiency of the evidence was irrelevant to the case at hand, the

appellant indicates that it was relieved of the burden of proving each element of the offense beyond a reasonable doubt with respect to Mr. Shonde's case, inferring that the plea of guilty was valid.

Under Rule 11 of the Federal Rules of Criminal Procedures, the district court judge has the power to accept or reject a plea agreement, Federal Rules of Criminal Procedures, Rule 11(e)(2). Perhaps the foremost requisite of a valid plea of guilty is the requirement that the judge be satisfied that there is a factual basis for the plea. After considering this matter and reviewing all of the files and records in the case and listening to the arguments of counsel as well as information disclosed during the trial, Judge Lord found that the facts were not sufficient to sustain Mr. Shonde's conviction. (Addendum I, 8). Federal Rules of Criminal Procedures, Rule 11(f).

Like all waivers of constitutionally protected rights, a plea of guilty is valid only if made knowingly, voluntarily and intelligently. Thundershield v. Solem, 429 F.Supp. 944, 949, affirmed 565 F.2d 1018, cert denied 435 U.S. 954, 98 S.Ct. 1585 (D.C. S.D. 1977) citing Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582 (1927). Circumstances which remove the voluntary character of the plea, or indicate that the plea was not knowingly made, leave the plea open to collateral attack. See McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969), involving the proper interpretation and application of Rule 11 in federal courts. The circumstances of this case reveal an invalid plea of

guilty which was properly vacated by Judge Lord. This is not a case involving a seasoned criminal with extensive experience in court proceedings. Mr. Shonde has no other experience with the criminal justice system other than this matter. He is a foreigner whose native language is not English and cannot be presumed to have the familiarity with the court as a native might have. Indeed what little record there is of Mr. Shonde responding in a narrative manner in open court reveals a pattern of broken thoughts. (See Addendum B, page 3). In this case, the requirements of Rule 11 were not met and therefore the plea was invalid and properly vacated.

Rule 11 has two purposes as stated by the United States Supreme Court in McCarthy. The first purpose is to ensure that the guilty plea is truly voluntary and the second purpose is to produce a complete record of the factors relevant to the voluntariness determination. Rule 11 requires a determination that the guilty plea is truly voluntary and also requires production of a complete record of the factors relevant to the voluntariness at the time the plea is entered. In McCarthy the court said that in addition, Rule 11 requires that the judge satisfy himself that there is a factual basis for the plea. Mr. Shonde asserts that this was not done in his case. In this case there is no indication on the record that Mr. Shonde was ever informed of the maximum penalty allowable under law for violation of the statute, nor is there an indication on the record that Mr. Shonde had a right to testify at trial if he chose. Neither was

there an indication that the government could not draw any inferences or make any remarks regarding Mr. Shonde's decision should he not testify. Nor was Mr. Shonde told that he would have access to the subpoena power of the court should he require it. Nor was there an inquiry into the state of mind of Mr. Shonde at the time of the change of plea. There is no on the record indication that Mr. Shonde was of a clear mind or that he understood the specific elements of the offense charged. Additionally, Mr. Shonde was not sworn when he made his statements. Nor was Mr. Shonde told that even if the jury returned a unanimous verdict of guilty, that he would have a right to appeal his convicton to a higher court, the Eighth Circuit Court of Appeals. Nor was Mr. Shonde told on the record that it was the government's burden to prove beyond a reasonable doubt each and every element of the crime charged and that he did not have to present any evidence or any witnesses or testify himself. There is no on the record indication that Mr. Shonde had the right to confront his accusers through his attorney's cross-examination of the government witnesses. There is no record that other promises were not included in the plea agreement. Nor is there any indication on the record that Mr. Shonde was not under the influence of any drugs or alcohol when he tendered his change of plea. Finally, there is no indication on the record that the plea was not induced by any threats or promises. (Addendum C).

The Court in McCarthy ruled that the failure to comply with Rule 11 deprives the criminal defendant of the rule's procedural

safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. McCarthy, supra at 471-472. The United States Supreme Court in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976) indicated that a plea made be involuntary in the constitutional sense if made without an understanding of the constitutional protections waived, or if made with such an incomplete understanding of the charges that it was not an intelligent admission of guilt. Henderson, supra, at 645, n. 13, 96 S.Ct. 2253.

Judge Lord's finding that there was insufficient information to support the conviction together with the incomplete record of the constitutional protections waived at the change of plea hearing supports Judge Lord's order vacating the guilty plea. The order should properly stand and Mr. Shonde respectfully requests that this Court affirm the order and judgment.

Further, Mr. Shonde contends that the indictment in this case was insufficient at law for failure to clearly state the mens rea requirement. A judge can dismiss an indictment which is insufficient at law when the defendant has pled guilty. Marteney v. United States, 216 F.2d 760, 762 (10th Cir. 1954). "One cannot plead guilty to an offense which is not affirmatively stated in the charge." The defendant in Marteney was convicted of violating Title 18, United States Code, Section 2314. After he was sentenced on his plea of guilty, he moved to arrest judgment on the ground that the indictment failed to charge a federal offense. The trial court refused to grant the motion. Subsequent-

ly, the Court of Appeals reversed the trial court, holding that the indictment was insufficient.

In United States v. Opsta, 659 F.2d 848 (8th Cir. 1981), the Court held that in order for an indictment to be sufficient, it must set forth the essential elements of the offense. In Opsta, the defendant was convicted of involuntary manslaughter. The indictment did not state intent as a specific element. The Court held failure of the indictment to allege criminal intent required dismissal of the indictment and reversal of the conviction.

The government relies on the case of Perry v. United States, 576 F.2d 158 (8th Cir. 1978) and states that any claim made by Mr. Shonde that the indictment was insufficient was waived by his guilty plea. However, although the Court of Appeals ruled against the defendant in that case, it did not preclude the defendant from exercising his constitutional rights and challenging the entry of his plea after sentencing. "It is elementary in American jurisprudence that an indictment must set forth the essential elements of the offense charged and if it does not, a conviction based thereon is fatally defective." United States v. Denman, 483 F.2d 1093, 1095 (8th Cir. 1973).

The appellant contends that Judge Lord erroneously dismissed the indictment. Even if this were the case, the dismissal was harmless error in that it did not prejudice the appellant. United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977); United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v.

Richards, 723 F.2d 646 (8th Cir. 1983); United States v. Yeo, 739 F.2d 385 (8th Cir. 1984). Appellant at the present time has the option of bringing the matter before the grand jury and attempting to obtain another indictment. Any error in this case is harmless error in that it did not prejudice the appellant.

CONCLUSION

For the foregoing reasons, the appellee respectfully requests that the order and judgment of the district court be affirmed.

Respectfully submitted,

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